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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

P. SANFORD ROSS, INC., CLAIMANT OF THE SCOW "6–S," Appellant,
v.
THE UNITED STATES OF AMERICA, Appellee.
No. 301.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a libel, in admiralty, filed against scow "6–S" by the United States under section 4 of the act of June 29, 1888 (25 Stat. 209), as amended. The statute is set out below. It makes the dumping of mud into New York Harbor, within certain limits, unlawful and prescribes penalties for such dumping. Appellant appeared as claimant of the scow. It was admitted by stipulation that there had been dumping within the prohibited area. The district judge made a decree (R. 8) imposing

the minimum money penalty prescribed by the statute.

The error now assigned (R. 11) rests upon the claim that the District Court as a Court of Admiralty was without jurisdiction to make a decree against the vessel or her claimant unless and until the penalty for which the vessel was so made liable had first been imposed by the court, as a criminal court, upon the owner or master, upon due trial and conviction.

THE STATUTE.

The precise contention will become clearer when the statute is set out.

The act of June 29, 1888 (25 Stat. 209), is entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses." Section 1 makes such dumping a misdemeanor and subjects "any person engaged in" or aiding it punishable by fine of not less than $250 nor more than $2,500 or by imprisonment or by both penalties. Section 2 provides the same penalties for engaging, as master of any vessel, in towing any scow loaded with the material forbidden to be dumped to the point of unlawful discharge. Section 3 as amended (28 Stat. 360 and 35 Stat. 426) forbids under heavy fine the towing of scows so loaded unless a permit shall first have been obtained "defining the precise limits

within which the discharge" of such scows may be made. It continues:

> And any deviation from such dumping or discharging places specified in such permit shall be a misdemeanor, and the owner and master * * * of any scows or boats dumping or discharging such forbidden matter in any place other than that specified in such permit shall be liable to punishment therefor as provided in section 1 * * *

Section 4 is as follows:

> That all mud * * * placed on any boat, scow, or vessel for the purpose of being taken or towed * * * to a place of deposit shall be deposited and discharged at such place * * * as in the third section of this act prescribed and not otherwise. Every person, firm, or corporation being the owner of any slip, basin, or shoal from which such mud * * * shall be taken * * * shall severally be responsible for the deposit and discharge of all such mud * * * at such place or within such limits so defined * * *; and for every violation of the provisions of this section the person offending shall be guilty of an offense against this act and shall be punished by a fine equal to the sum of five dollars for every cubic yard of mud * * * deposited or discharged as required by this section.
>
> *Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way*

of libel in any district court of the United States having jurisdiction thereof. [Italics ours.] (25 Stat., p. 210.)

THE CONTENTIONS OF THE PARTIES.

The appellant contends that section 4 intends to make the vessel only secondarily liable as security for the payment of any penalty which may, under the provisions of the statute be imposed upon her master or owner; it is said to follow that the conviction of the owner or master in a criminal proceeding is a necessary condition precedent to action against the vessel.

To this the Government replies that the section make the vessel itself an offender subject to the pecuniary penalties which are made enforceable summarily by action *in rem*.

In passing it calls attention to the fact that the stipulation that the act forbidden had been done makes the plea highly technical.

ARGUMENT.

I.

The pecuniary penalties imposed by the act of June 29, 1888, may be recovered by libel proceedings without a prior criminal conviction.

The wording of section 4 of the act of June 29, 1888, indicates plainly the intention of Congress to impose upon vessels which had been employed in violating the act unqualified liability for pecuniary penalties imposed by the act. The words are that

"any boat * * * shall be liable" and that it "may be proceeded against summarily."

The opinion of the district judge (R. 7) pointed out that the word "summarily" can be given no meaning unless it is interpreted as authorizing a libel to which no conditions precedent attach. The appellant suggests that the word may have been used as descriptive of the nature of the remedy by way of libel. This interpretation not only violates the grammatical meaning of the language in making an adverb into an adjective, but it also leaves the word without meaning, for a description of the nature of the remedy adds nothing to it. The effect to be given the phrase now under consideration was well stated in *The Missouri*, Fed. Cas. No. 9652:

> The words, "seized and proceeded against summarily," preclude the idea of delay, and import that the proceeding may follow the unlawful act, and rest upon that alone, thus adopting the rule of the maritime law that a ship may be treated as a person and "judged and sentenced accordingly." *The Moses Taylor*, 4 Wall. 427; *The Palmyra*, 12 Wheat. 14.

The Strathairly, 124 U. S. 558, has been relied on by the appellant. This was an action of libel brought pursuant to section 4270, Revised Statutes, to recover for violation of regulations for accommodation of passengers on vessels. By opposing in parallel columns section 4270 and that now before this court, the difference in the remedy provided is patent.

Sec. 4. *Any boat or vessel* used or employed in violating any provision of this Act *shall be liable* to the pecuniary penalties imposed thereby and *may be proceeded against summarily* by way of libel in any District Court of the United States having jurisdiction thereof. [Italics ours.]

Sec. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carrying of passengers in merchant vessels shall be liens on the vessels violating these provisions and such vessel shall be liable therefor in any Circuit or District Court where such vessel shall arrive.

Section 4270 does not announce summary procedure by way of libel; it simply makes a declaration of a lien. The wording of the section and the holding of this Court in *The Strathairly, supra,* that recovery under it must be limited to penalties imposed in criminal proceedings serve to emphasize the wider latitude of section 4 of the act of June 29, 1888.

The appellant contends that it could not have been the intent of the statute to impose a double liability recoverable both in civil and criminal proceedings and that therefore the civil action must be regarded as simply a means of enforcing criminal liability. Even if the premise be conceded, the conclusion does not follow. The act may be said to give alternative civil and criminal remedies for the recovery of pecuniary penalties and to allow only a single recovery. The decision in *United States* v. *Atlantic Fruit Company,* 206 Fed. 440 as interpreted in *United States* v. *James W. Ellwell & Co.,* 250 Fed. 939 was that the statute there in question gave the United States an election to proceed to recover the fine imposed either in a civil or criminal action.

In cases of condemnation and forfeitures, both at law and in admiralty, the right to proceed therein by libel in rem is independent of the criminal provisions of the acts. *The Palmyra*, 25 U. S. 1, 14; *The Three Friends*, 166 U. S. 1, 49, 50; *Dobbin's Distilling* v. *United States*, 96 U. S. 395; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

Original proceedings by libel *in rem* for penalties have been sustained under section 16 of the act of March 3, 1899 (30 Stat. 1153), which prohibits dumping in harbors generally and subjects vessels violating its terms to penalties in substantially the same language as section 4. *Scow 36*, 144 Fed. 932 (C. C. A. 1st Cir.); *Scow No. 9*, 152 Fed. 548 (D. C. Mass.).

In construing like provisions of analogous legislation the lower courts uniformly have held that the liability of the offending vessel for the payment of penalties is a primary obligation, and independent of any criminal proceedings against its master or owner. *The Tokai Maru*, 190 Fed. 450 (C. C. A. 9th Cir.); *The C. G. White*, 64 Fed. 579 (C. C. A. 9th Cir.); *The Ben R.*, 134 Fed. 784 (C. C. A. 6th Cir.); *United States* v. *The Queen*, Fed. Cas. No. 16107; 16108; *The Missouri*, Fed. Cas. No. 9652; *The Helvetia*, Fed. Cas. No. 6345; *Pollock* v. *Steamboat Seabird*, 3 Fed. 573.

The act of June 29, 1888, passed by virtue of the Federal control over navigable waters, in the interest of and for the aid of commerce, intends to protect New York Harbor and its adjacent waters, for the development of

which vast appropriations have been expended. Its enforcement is in aid of navigation for the public good. The Act is an exercise of police powers inherent in the Government. It is remedial and must therefore be construed to effect the purpose it serves.

If the act of June 29, 1888, is construed to require the criminal conviction of the master or owner as a condition precedent to proceedings under the act against any vessel, violations in many instances must go unpunished. Masters of scows are usually irresponsible and shifty, owners frequently nonresidents, and there is always difficulty in apprehending them. Even when apprehended there is opportunity to escape punishment through failure to prove identity or by formal defect in the proceedings. But where there is simply a civil proceeding, the owners of the vessels in the majority of cases admit liability, and a penalty is assessed without a hearing. It follows that if the act is to achieve its remedial purpose of preventing illegal dumping in New York Harbor it should be construed to allow recovery by libel independently of criminal proceedings.

The opinion of the district judge states (R. 8) that it has been the uniform practice of the Federal courts since the passage of the act of June 29, 1888, to allow libels such as the present one independently of criminal proceedings or conviction. In many cases such a libel has been allowed [1] and in other cases while such a libel was disallowed upon the

[1] *United States* v. *The Sadie*, 41 Fed. 396; *The Bombay*, 46 Fed. 665; *The J. Rich Steers*, 228 Fed. 319; *United States* v. *Various Scows*, 225 Fed. 505; *The Columbia*, 255 Fed. 515.

merits of the case, the court made no reference to want of jurisdiction.[1]

The appellant, at the hearing in the District Court stipulated that scow "6–S" was employed in violating the act (R. 6.). This admission, if the owner had been tried criminally, would require a verdict of guilty.

II.

An unliquidated penalty may be recovered in the present action.

Appellant contends that the admiralty court has no criminal jurisdiction and that a civil action to recover a penalty can be brought only when the amount is liquidated.

There is here no question of criminal jurisdiction. It has been repeatedly held by this court that a suit to recover a sum prescribed in a statute as a penalty for its violation is a civil and not a criminal proceeding (*Hepner* v. *United States*, 213 U. S. 103 and cases there cited).

While a civil suit for penalties is ordinarily in the form of an action for debt and while there is some doubt whether an action of debt will lie to recover a sum uncertain in amount, it has been held that a civil

[1] *The G. L. Garlic*, 45 Fed. 380; *The Anjer Head*, 46 Fed. 664; *The Emperor*, 49 Fed. 751.

action of some kind does lie to recover such an unliquidated penalty. *United States* v. *Atlantic Fruit Company, supra; United States* v. *James W. Elwell & Co., supra.* The difficulty which is said to exist relates solely to the form of action at law and has no application to proceedings in admiralty.

Jurisdiction in admiralty for forfeitures and penalties whether liquidated in character or not, has always been exercised. Such jurisdiction in the District Courts exists by virtue of the general grant to them of "all civil causes of admiralty and maritime jurisdiction." Express statutory grant is not essential. Benedict's Admiralty, 4th Ed., pp. 167, 168; 1 Corpus Juris. 1280.

The jurisdiction of the District Court sitting in admiralty enforcing penalties against vessels by proceedings in rem has never been determined by the question whether such penalties are liquidated or unliquidated, and there is no reason for applying such test.

CONCLUSION.

For the reasons stated the appeal should be dismissed.

LaRue Brown,
Assistant Attorney General.

April, 1919.

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